

IN THE FAIR WORK COMMISSION

4 Yearly Review of Modern Awards

National Disability Services

Submission – AM2018/26

Social, Community, Home Care and Disability Services Industry Award 2010

Final Stage – remote response, damaged clothing, and broken shift

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Introduction

- 1. National Disability Services (NDS) makes the following submission pursuant to the Decision regarding Tranche 2 of the substantive claims, published on 4 May 2021 ([2021] FWCFB 2383), and the Directions issued on 9 August 2021.
- 2. This submission deals with remote response, damaged clothing, and specific matters relating to broken shift.

Damaged clothing

- 3. The parties have conferred regarding the development of a draft determination to deal with damaged clothing.
- 4. An agreed draft clause has been developed by the parties and our understanding is that the parties’ draft clause will be submitted by AiG. NDS supports the agreed draft clause.
- 5. In our view, the parties’ draft clause strikes an appropriate balance in this matter, recognising the views expressed by the Full Bench at [881] and [889] of the 4 May 2021 Decision.

Remote response

- 6. The parties have conferred regarding the issues raised by the Full Bench relating to remote response work.
- 7. On 23 August 2021, the Australian Business Lawyers (ABL) filed a draft determination that reflects an agreement that has been reached between the unions and a number of the employer parties.

8. NDS supports the draft determination, noting that there is one issue that has not yet been agreed between the parties, regarding the minimum payment for remote response work performed by an on-call employee between the hours of 10pm to 6am.
9. The Full Bench set out a number of parameters and provisional views regarding remote response and we submit that the draft determination addresses each of those matters in a balanced and reasonable way.
10. At [722] of the Decision the Full Bench observed that a remote response term should:
 - a) provide for a shorter minimum payment in circumstances where the employee is being paid an 'on call' allowance;
 - b) ensure that each discrete activity (such as a phone call) does not automatically trigger a separate minimum payment;
 - c) include a definition of remote response work;
 - d) include a mechanism for ensuring that the time spent by an employee working remotely is recorded and communicated to their employer.
11. At [733] the Full Bench expressed the provisional view regarding minimum payments
"...the minimum payment for remote response work performed between 6.00am and 10.00pm should be 30 minutes and the minimum payment between 10.00pm and 6.00am should be 1 hour. However we note that there is an inter-relationship between the minimum payment period and the rate of payment."
12. Finally, the Full Bench expressed the view that the issue of the "appropriate rate" required further discussion and clarification.
13. Our submission is that the draft agreement filed by ABL satisfactorily addresses the issues identified by the Full Bench.

Minimum payment
14. The proposed draft determination provides for a shorter minimum payment for employees who are on-call compared to employees who are not on-call;
15. The proposed clause differs from the provisional view of the Full Bench in that the minimum payment for an on-call employee is proposed to be 15 minutes for work between 6am and 10pm. This recognises that much of the work that occurs is short in duration and in the case of an on-call employee, the employee is on notice of the likelihood of an interruption.
16. We agree that the minimum payment for an employee who is on-call between 10pm and 6am should be higher due to the disutility associated with late night calls. Agreement has not been reached regarding this and the proposed clause does not specify a minimum payment. We propose a minimum payment of 30 minutes. Once again, we take account of the likelihood that many calls will be quite short in duration and consider that this provides a proportionate entitlement.
17. At clause 25.10 (c) (i) D we propose that remote work can also cover remote participation in staff meetings and training, with a minimum payment of one hour.
18. The 4 May Decision at [1269] provided parties with an opportunity to make submissions regarding a proposed one hour minimum engagement for staff meetings and training. As part of the agreement reached in relation to remote response, NDS does not press that

proposal, but we submit that there is merit in providing for a one hour minimum payment in relation to those activities carried out remotely and occasionally and which do not require an employee to physically travel to a workplace.

19. The proposed clause at 25.10 (c) (iii) also provides that where multiple instances of remote response are performed within the applicable minimum payment period, this does not trigger a new minimum payment. However, a new minimum payment will apply to multiple instances that are outside the span of an earlier minimum payment.

Definition of remote work

20. The proposed clause at 25.10 (b) defines remote work in a simpler format than some of the previous drafts provided by various parties during the proceedings.
21. One of the issues raised in the proceedings was that it might be necessary to explicitly exclude activities which do not normally constitute work, such as personal tasks incidental to maintaining employment. This would include things such as an employee reviewing or managing their own roster communicating with their employer about their availability for work, or accepting additional hours, calling in sick, etc.
22. The parties to the agreed proposed clause, including NDS, formed the view that as such activities do not amount to the 'performance of work' within the general industrial meaning of that phrase, it was unnecessary to include such a carve-out.
23. It is not our intention for those incidental activities to constitute 'remote work' or trigger any entitlement under the clause.

Appropriate rate of pay

24. The Full Bench observed that there is some complexity regarding the expression of the appropriate rate of pay.
25. The proposed clause at 25.10(d) deals with this by specifying the actual rate for each of the various circumstances that might apply, with the rates being consistent with the rates that would otherwise apply under other provisions of the award.

Records

26. At clause 25.10 (e) the draft determination addresses the issue of ensuring that time spent by an employee on remote work is recorded and communicated to the employer.

Interaction with other clauses

27. The draft determination provides for consequential amendments to the On-call allowance and recall to work overtime provisions of the award.
28. The draft also clarifies at 25.10 (f) that remote response does not count towards work taken into account in other clauses of the award which are primarily concerned with non-remote work. In our view, in the absence of this sub-clause, the remote response provisions would become unworkable.

Broken Shift

29. In our submission of 4 August 2021, we proposed an amendment to the first sentence of clause 25.6 in the draft determination at Attachment P of the 4 May 2021 Decision to the effect that the broken shift provisions should apply only to day workers.

30. The proposal arose from a consideration of whether or not shift penalty rates could be said to apply in addition to the broken shift allowance.
31. We observed that clause 29.4 of the award provides that shifts under clause 29.4 must be continuous and that clause 25.2 establishes two types of workers for the purposes of hours of work arrangements – day workers and shiftworkers.
32. Taken together we submitted that the broken shift clause could only apply to day workers, since a broken shift worker does not meet the definition at clause 29.4.
33. The current clause 25.6 (b) of the award specifies that payment for a broken shift will be at ordinary pay with penalty rates and shift allowances in accordance with clause 29.
34. The current clause 25.6 (b) does not define broken shift workers as shiftworkers for the purpose of clause 29, it only specifies the payment for broken shift.
35. For this reason, our view is that there is no difficulty caused by clause 29.4 in relation to broken shift under the current award.
36. Our view, consistent with the 4 May Decision, is that the new clause 25.6 (d) of the draft determination replaces the current clause 25.6 (b).
37. We do not resile from the earlier submission regarding the application of broken shift to day workers, but now propose that there may be an alternative approach which makes more practical sense instead.
38. We propose that clause 29.4 could be amended as follows:

“Shifts are to be worked in one continuous block of hours, other than when a broken shift is performed by an employee in a disability or home care service under clause 25.6, and may include meal breaks and sleepover”.
39. This amendment would clarify that an employee working broken shift may be employed as a shiftworker.
40. It is not intended to disturb the provision that a meal break or sleepover does not break the continuity of a shift.
41. We have not been able to confirm the history of how clause 29.4 was included in the award, but we note that there was an identical provision at clause 15.4 of the Social and Community Services Employees (State) Award (AN120505) which applied in NSW. That award did not provide for broken shifts to be worked and it may be that when that wording was used for the SCHADS award clause 29.4, the interaction with the new broken shift provisions for the modern award was not considered at the time.
42. We do not press the proposed amendment to the draft determination regarding the reference to day workers in the first sentence of the clause that was set out in our submission of 4 August 2021.
43. We also proposed that clause 25.6(d) of the draft determination be amended to specifically refer to penalty rates for time worked outside the span of hours. This was proposed with the example set out at [491] of the 4 May 2021 Decision taken to indicate that penalty rates would apply to all work performed outside the span of hours.
44. The evidence in the proceedings indicates that broken shifts sometimes extend beyond the span of hours, with most of the evidence relating to a significant minority of shifts commencing at 5am or finishing by 10pm.

45. If clause 25.6 is not restricted to day workers, it will be necessary to provide that the relevant overtime penalty rates in clause 28 for work performed outside the span of hours also apply to broken shift workers. This will be consistent with the approach outlined in the example provided in the May Decision at [491].
46. This could be achieved by amending the draft determination at clause 28 as follows:
- 28.1 (a) A full-time employee....outside the span of hours (day workers and broken shift workers only)....*
- 28.1 (b) (iv) All time worked outside the span of hours by part-time and casual day workers and broken shift workers....*
47. NDS opposes the ASU proposal regarding the addition of shift penalties to the draft clause 25.6(d) as the decision was clear that it replaces the current reference to shift penalty rates.
48. NDS also opposes the ASU proposal regarding payment for travel during meal breaks. This appears to be a new claim. In any event the issue relates to travel time and we agree with the view expressed by the Full Bench that the changes to broken shift are likely to substantially address that issue.
49. Further, we note the Decision published today which at [230] defers consideration of any further claims regarding travel time until the minimum payment and broken shift provisions have been in operation for 12 months.

Michael Pegg

On behalf of National Disability Services

25 August 2021